Supreme Court, U.S.
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No. 98-___

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

WILLIE P. COLEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Are the exclusionary provisions of Federal Rule of Criminal Procedure 11(e)(6) waivable to the extent of permitting use of the defendant's proffer to meet the government's affirmative burden of proof rather than for purposes of impeachment?

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Willie P. Coleman respectfully asks that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals affirming the judgment of conviction and sentence against him.

OPINIONS BELOW

The opinion of the court of appeals, *United States v Willie P. Coleman,* 149 F.3d 674 (7th Cir. 1998), is in Appendix A. The unpublished order of that court denying reconsideration is in Appendix B.

The oral decision of the District Court permitting the government to use the defendant's proffer at sentencing is in Appendix C.

JURISDICTION

The court of appeals entered judgment on July 16, 1998, and denied the petitioner's timely request for rehearing of that decision on August 17, 1998. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13.3.

STATUTORY PROVISION INVOLVED

This petition concerns the construction and application of Fed. R. Crim. P. 11(e)(6), which provides as follows:

> **(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any criminal or civil proceeding, admissible

against the defendant who made the plea or was a participant in the plea discussions:

(A) A plea of guilty which was later withdrawn;

(B) A plea of nolo contendere;

(C) Any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

STATEMENT OF THE CASE

On March 5, 1997, agents of the Wisconsin Department of Justice, Division of Narcotics Enforcement, arrested Willie Coleman just prior to searching his home

pursuant to a search warrant. The agents recovered approximately 1370 grams of powder cocaine and $49,162 as a result of that search.

On March 12, 1997, Mr. Coleman and his attorney entered into a written "proffer agreement" with the federal prosecutor. That agreement provided that any information relayed to the government by Coleman or his attorney pursuant to that agreement would "not be used directly against Mr. Coleman in any criminal proceedings, consistent with Rule 11(e) of the Federal Rules of Criminal Procedure." The agreement went on to state that

> any and all of [Coleman's] statements may be used against him in any prosecution for perjury or making a false statement. Further, in the event that any information is presented either to the court or a jury in this case by, or on behalf of [Coleman], and such information contradicts statements made by [Coleman] during the anticipated interview, then the government will be free to use any such statements against [Coleman].

A copy of the proffer letter is included in Appendix D.

Pursuant to this agreement, Coleman provided information regarding his involvement with the distribution of cocaine beyond the quantity found during the search of his home.

On September 19, 1997, Coleman entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2) to all six counts alleged in the superseding indictment, and agreed to forfeiture of $49,162 also found during the search of his home.[1] He expressly reserved the right to appeal denial of certain suppression motions which are not at issue on this petition.

The presentence investigation report (PSI) prepared in the case attributed nearly 12 kilograms of cocaine to Coleman for purposes of relevant conduct under the Sentencing Guidelines. In addition to the cocaine found in Coleman's home, this quantity was based upon information allegedly provided to the government by two confidential informants and a third unidentified individual who was involved in drug trafficking.

The first informant claimed to have purchased cocaine from Coleman in 1992 and 1995, and to have attempted unsuccessfully to purchase cocaine from him in March, 1996.

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[1] The superseding indictment alleged conspiracy to distribute cocaine, in violation of 21 U.S.C. §§841(a)(1) & 846 (Count 1), use of a communications facility to further cocaine distribution, in violation of 21 U.S.C. §843(b) (Counts 2, 3, and 4), distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) (Count 5), and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1) (Count 6).

The second claimed to have witnessed approximately 12 other transactions involving Coleman, apparently during early 1997. The third individual allegedly claimed to have purchased "no less than 9 ounces and up to 18 ounces of cocaine from Mr. Coleman," which the presentence author construed as monthly amounts, totalling nearly 6 kilograms.

Coleman filed objections to the PSI, in which he objected and "put[] the government to its proof" regarding alleged quantities beyond the 1370 grams found in his home.

At the sentencing hearing, the government took the position that Coleman's objection to the quantities alleged beyond that found in his home vitiated the proffer agreement, thereby permitting the government to offer statements made by Coleman pursuant to that agreement. Over defense objection, the district court agreed. A copy of that court's oral decision on this point is attached as Appendix C.

The government then summarized the statements Coleman made pursuant to the proffer agreement. It presented no live testimony regarding the applicable quantity under the Sentencing Guidelines, and neither did the defendant.[2] The district court concluded that the applicable

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[2] Coleman presented no evidence at the sentencing hearing. Contrary to the Court of Appeals' belief, therefore, Coleman did (continued...)

quantity was between 5 and 15 kilograms of cocaine, for a base offense level of 32.

Additional guidelines adjustments not at issue here resulted in an offense level of 31, a criminal history category III, and a Guidelines sentencing range of 135 to 168 months. The district court imposed a sentence of 135 months and a fine of $3,000, which was below the effective guidelines range.

Inclusion of 2 to 3.5 kilograms of cocaine, based only on the 3.3 kilograms attributable to the cocaine and money found in Coleman's home, would have resulted in an offense level of only 27 and a guidelines sentencing range of 87 to 108 months. U.S.S.G. ch. 5, Pt. A (Sentencing Table).

Coleman timely filed his notice of appeal and, on June 16, 1998, the Seventh Circuit Court of Appeals affirmed the convictions and sentences (Appendix A). *United States v. Willie P. Coleman*, 149 F.3d 674 (7th Cir. 1998). On August 17, 1998, that Court denied the defendants' timely-filed

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[2](...continued)
not "present contradictory testimony regarding the amount of cocaine attributed to him." A:8. Because the government likewise failed to present any evidence other than Coleman's proffer, the Court of Appeals likewise was wrong in asserting that evidence independent of the proffer supported the District Court's finding regarding the quantity of cocaine attributable to Coleman. A:9

petition for rehearing (Appendix B).[3]

The court of appeals had jurisdiction to hear this appeal from a final judgment of conviction and sentence under 18 U.S.C. §3742(a) and 28 U.S.C. §1291.

REASONS FOR ALLOWANCE OF THE WRIT

Federal Rule of Criminal Procedure 11(e)(6) provides that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant. In *United States v. Mezzanatto*, 513 U.S. 196 (1995), seven members of this Court held that the exclusionary provisions of Rule 11(e)(6) and Federal Rule of Evidence 410 are subject to knowing and voluntary waiver by the defendant, at least to the extent of allowing the government to impeach the defendant with statements made during plea bargaining.

Three members of that majority, however, recognized that affirmative use of such statements to meet the government's burden of proof may require a different result, *see Mezzanatto*, 513 U.S. at 211 (Ginsburg, O'Connor &

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[3] By Order dated August 3, 1998, the Court of Appeals granted Coleman's motion to extend the time for filing his petition for rehearing.

Breyer, JJ., *concurring*),[4] and the two dissenters rejected any waiver of the exclusionary provisions under those rules, *id.* at 211-18 (Souter & Stevens, JJ., *dissenting*).

This petition presents the issue left unresolved in *Mezzanatto*:

> Are the exclusionary provisions of Rule 11(e)(6) waivable to the extent of permitting use of statements made in the course of plea negotiations to meet the government's affirmative burden of proof rather than for purposes of impeachment?[5]

Following his arrest on federal drug charges, the

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[4] Justice Ginsburg's concurrence reads as follows:

> The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress' intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case-in-chief would more severely undermine a defendant's incentive to negotiate, and thereby hinder plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.

513 U.S. at 211.

[5] Because this case addresses use of proffered statements to meet the government's burden of establishing facts necessary for an upward adjustment at sentencing rather than its burden at trial, the similar provisions of Fed. R. Evid. 410 are not directly at issue in this case. *See Williams v. New York*, 337 U.S. 241 (1949) (rules of evidence generally do not apply at sentencing).

defendant in *Mezzanatto* asked to meet with the prosecutor to discuss the possibility of cooperating with the government. The prosecutor agreed to meet with the defendant and his attorney, but conditioned any proffer and cooperation on the defendant's agreement that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far. After conferring with counsel, the defendant agreed to those terms and was debriefed regarding his involvement in methamphetamine trafficking.

At trial, Mezzanatto testified on his own behalf and denied any involvement in such trafficking. He appealed his ultimate conviction, arguing that the government should not have been permitted to impeach him with his contrary statements in the proffer. The Ninth Circuit reversed, holding that the proffer agreement was unenforceable to the extent that it allowed admission of Mezzanatto's proffer for purposes of impeachment. *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993).

Reversing the decision of the Ninth Circuit, this Court held that, consistent with most other constitutional and statutory provisions, the exclusionary provisions of Rule 410 and Rule 11(e)(6) are "presumptively waivable." 513 U.S. at 200-03. The Court further held that the three bases proposed

by Mezzanatto for overcoming that presumption were unpersuasive.

While acknowledging that "there may be some evidentiary provisions that are so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably 'discredit[ing] the federal courts,'" the Court held that "admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts." 513 U.S. at 204 (citations omitted; emphasis in original). The Court emphasized that

> [u]nder any view of the evidence, the defendant has made a false statement, either to the prosecutor during the plea discussion or to the jury at trial; making the jury aware of the inconsistency will tend to increase the reliability of the verdict without risking institutional harm to the federal courts.

Id. at 205.

The Court also rejected Mezzanatto's assertion that waiver for purposes of impeachment "is fundamentally inconsistent with the Rules' goal of encouraging voluntary settlement." 513 U.S. at 206-09. While noting the purpose of the Rules to promote disposition of criminal cases by compromise, the Court concluded that, "in this case there is

no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining." *Id.* at 207. Specifically, the Court noted that "although the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it." *Id.*

> Because prosecutors have limited resources and must be able to answer "sensitive questions about the credibility of the testimony" they receive before entering into any sort of cooperation agreement . . ., prosecutors may condition cooperation discussions on an agreement that the testimony provided may be used for impeachment purposes. . . . If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.

Id. at 207-08 (citations and footnote omitted).

The Court likewise rejected Mezzanatto's argument that such waiver agreements should be forbidden because they invite prosecutorial overreaching and abuse. 513 U.S. at 209-10. The Court noted that the dilemma faced by defendants confronted with such agreements is indistinguishable from numerous other decisions criminal defendants face and that

"[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether." *Id.* at 210. Instead, the Court held that the potential for abuse should be met by permitting case-by-case inquiries regarding the validity of the waiver. *Id.*

This Court's rejection in *Mezzanatto* of two of the three proposed bases for a uniform rule against waiver thus rests squarely upon the fact that *only* impeachment was involved in that case. As suggested by Justice Ginsburg's concurrence, moreover, the distinction between waivers permitting use of proffers for impeachment and those permitting substantive use is one of significance. It is one thing to say that a defendant's proffer can be used to impeach him at a subsequent proceeding should he testify falsely or to counter false evidence presented by the defense; it is something quite different to say, as the government successfully argued here, that a defendant's proffer may be used affirmatively to meet the government's burden, whether at trial or at sentencing, merely because the defense has put the government to its proof.

Rules 410 and 11(e)(6) were designed to encourage plea agreements by "permit[ting] the unrestrained candor which produces effective plea discussions." Fed. R. Evid.

410 advisory committee's note to 1980 amendments. As the Court held in *Mezzanatto*, waiver of the exclusionary provisions of those rules to permit use of the defendant's proffer for purposes of impeachment does not undermine that purpose.

Both the defendant and the government have an interest in waiver for purposes of impeachment. As the Seventh Circuit recently explained:

> By authorizing the prosecutor to use his statements if he should contradict himself, Krilich made his representations more credible, and thus strengthened his hand in negotiations. [citations omitted]. A prosecutor may be reluctant to negotiate; what has the defendant to offer? A statement that shows how the defendant's aid could assist the prosecutor in other cases (or lead to the appropriate sentence in this one) may get negotiations under way and set the stage for a favorable bargain. But a prosecutor needs assurance that the defendant is being candid. A conditional waiver of the kind Krilich signed tends to keep the defendant honest, which makes the proffer device more useful to the both sides.

United States v. Krilich, ___ F.3d ___, 1998 WL 744587 *3 (7th Cir., Oct. 27, 1998).

Such waivers also benefit the criminal justice system by ensuring that otherwise valid privileges are not "perverted

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into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *See Harris v. New York*, 401 U.S. 222, 226 (1971).

Congress appears to agree with this evaluation, having itself provided for admission of proffers in cases of perjury or false statements. As explained in the Advisory Committee note:

> The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. *The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness.*

Fed. R. Crim. P. 11(e)(6) advisory committee's note to 1975 amendments (emphasis added).

While impeachment waivers thus potentially benefit both parties and the judicial system, the same cannot be said of agreements permitting use of the proffer to meet the government's burden in its case-in-chief should plea

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negotiations not work out. Rather, such waivers frustrate the purposes of Rules 11(e)(6) and 410 without providing any corresponding benefit to the defendant or the criminal justice system.

Such a waiver would, as suggested by Justice Ginsburg, "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring). A defendant would have little, if anything, to gain from such a waiver. Such a waiver does not enhance his credibility; it merely increases the likelihood of conviction or a greater sentence should he put the government to its proof at trial or at sentencing.

The degree of risk, moreover, does not necessarily turn on the defendant's own actions. A defendant cannot know whether a prosecutor is bargaining with an eye toward reaching a final deal seriously, tentatively, or not at all. The only way that he can find out is by agreeing to speak. Yet, if the government decides, for whatever reason, not to offer a plea bargain, the defendant comes away from the bargaining table not where he would have been had he not initiated the conversation, but in a much worse position. The prosecutor could simply take the proffer, refuse any offer, and then use the proffer to prove its case.

Given the enhanced risks and uncertainty of such a procedure, few knowledgeable defendants voluntarily would place themselves in the position of agreeing to such a waiver, directly inhibiting Congress' goal of promoting plea bargaining.

At the same time, barring such waivers would not harm any legitimate interests of the government or otherwise reduce the government's incentive to plea bargain. The structure of our criminal justice system requires the government to bear the burden of proving guilt and, on the issue of sentencing, proving any factual allegations necessary for enhancement under the Sentencing Guidelines, without the defendant's assistance. *See, e.g., United States v. Watts*, 117 S.Ct. 633 (1997). While waivers permitting impeachment help protect the government from deceit, waivers permitting substantive use of the proffer do not protect the government from anything. Instead, they merely act to lighten the burden our Constitution places on the government in our system of justice. While the government no doubt would prefer an easier time of proving its case, being held to the constitutional standard is not the type of disincentive which would cause it to decline offers to cooperate.

Finally, it is not novel to suggest that the underlying purposes of a rule may demand exclusion from the

government's case-in-chief while permitting use of the same evidence for purposes of impeachment. In *Walder v. United States*, 347 U.S. 62 (1954), this Court held that prosecutors may introduce illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's own testimony. The Court explained that a defendant

> must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

Id. at 65.

See also Michigan v. Harvey, 494 U.S. 344 (1990) (statements taken in violation of Sixth Amendment right to counsel may not be admitted as substantive evidence in prosecution's case-in-chief, but may be used to impeach defendant's false or inconsistent testimony); *United States v. Havens*, 446 U.S. 620 (1980) (evidence otherwise inadmissible because seized in violation of Fourth Amendment nonetheless may be used to impeach a defendant's false testimony); *Harris v. New York*, 401 U.S.

222 (1971) (statements inadmissible to establish the prosecution's case-in-chief under *Miranda v. Arizona*, 384 U.S. 436 (1966), could properly be used to impeach defendant's credibility).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the court of appeals.

Dated at Milwaukee, Wisconsin, November 16, 1998.

Respectfully submitted,

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APPENDIX A

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works
149 F.3d 674
(Cite as: 149 F.3d 674)

UNITED STATES of America, Plaintiff-Appellee,
v.
Willie P. COLEMAN, Defendant-Appellant.
No. 97-4206.
United States Court of Appeals,
Seventh Circuit.
Argued May 14, 1998.
Decided July 16, 1998.
Rehearing Denied Aug. 17, 1998.

Defendant was convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., for six counts of cocaine distribution and attributed weapons enhancement to him under sentencing guidelines. Defendant appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) district court properly denied defendant's request for evidentiary hearing on his motion to suppress; (2) probable cause existed for issuance of search warrant for defendant's home; (3) district court properly used defendant's conditional guilty plea proffer at sentencing; and (4) fully loaded revolver found in defendant's home was sufficiently linked to drug offenses to support two-level weapons enhancement at sentencing.

Affirmed.

[1] CRIMINAL LAW k394.6(5)
110k394.6(5)
Evidentiary hearings on motions to suppress are not granted as a matter of course but are held only when the defendant alleges sufficient facts which if proven would justify relief.

[2] CRIMINAL LAW k394.6(5)

110k394.6(5)
Evidentiary hearings on motions to suppress are warranted only when the allegations and moving papers are sufficiently definite, specific and nonconjectural and detailed enough to enable the court to conclude that a substantial claim is presented and that there are disputed issues of material fact which will affect the outcome of the motion.

[3] CRIMINAL LAW k394.6(5)
110k394.6(5)
Trial court properly denied defendant's request for evidentiary hearing on his motion to suppress in prosecution for cocaine distribution, where defendant simply stated that testimony in support of search warrant was insufficient, inaccurate, and stale.

[4] CRIMINAL LAW k1139
110k1139
District court's determination that probable cause existed to issue the search warrant is reviewed de novo. U.S.C.A. Const.Amend. 4.

[5] DRUGS AND NARCOTICS k188(7)
138k188(7)
Probable cause existed for issuance of search warrant for defendant's home, where confidential informant observed defendant sell cocaine in multiple ounce quantities, other informants provided information that defendant was involved with drug trafficking, trash pick-up at home recovered brown "tape-like" paper used to wrap kilogram quantities of cocaine, cuts from plastic baggies, and white paper residue, field test of those items revealed presence of cocaine, and magazines in trash bore defendant's name and address. U.S.C.A. Const.Amend. 4.

[6] CRIMINAL LAW k1312
110k1312
Trial court properly allowed government to use defendant's

conditional guilty plea proffer for purposes of determining his relevant conduct at sentencing on six counts of cocaine distribution; plea agreement was not in effect and proffer was not binding because defendant did not cooperate with law enforcement, even if plea was in effect, defendant violated its terms by presenting evidence contradicting amount of cocaine attributed to him, and evidence independent of proffer existed regarding defendant's relevant conduct. 18 U.S.C.A. s 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, ss 401(a)(1), 402(a)(1), 403(b), 413, as amended, 21 U.S.C.A. ss 841(a)(1), 842(a)(1), 843(b), 853.

[7] CRIMINAL LAW k1158(1)
110k1158(1)
Court of Appeals will reverse the district court's enhancement for possession of a weapon only if its finds clear error. U.S.S.G. s 2D1.1(b)(1), 18 U.S.C.A.

[8] CRIMINAL LAW k1208.6(2)
110k1208.6(2)
Fully loaded revolver found in defendant's home, the same place defendant conducted his business, was sufficiently linked to drug offenses to support two-level weapons enhancement at sentencing. 18 U.S.C.A. s 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, ss 401(a)(1), 402(a)(1), 403(b), 413, as amended, 21 U.S.C.A. ss 841(a)(1), 842(a)(1), 843(b), 853; U.S.S.G. s 2D1.1(b)(1), 18 U.S.C.A.

***675** Thomas P. Schneider, Carol L. Kraft (argued), Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.

Jonathan C. Smith, Milwaukee, WI, for Defendant-Appellant.

***676** Before POSNER, Chief Judge, and CUMMINGS and BAUER, Circuit Judges.

BAUER, Circuit Judge.

On appeal, Willie P. Coleman challenges his conviction for six counts of cocaine distribution, in violation of 18 U.S.C. s 2; 21 U.S.C. ss 841(a)(1), 842(a)(1), and 843(b); and 21 U.S.C. s 853. For the reasons set forth below, we affirm.

BACKGROUND

On March 5, 1997, Agent Tina Virgil of the Wisconsin Department of Justice, Division of Narcotics Enforcement ("DNE") obtained a search warrant for Coleman's residence. The DNE had been investigating Coleman for approximately two years in connection with drug trafficking activities. At around 10:00 a.m. on March 5, DNE agents followed Coleman fourteen blocks to his business address, at which point they identified themselves, handcuffed him, and took him back to his residence. While other agents searched his home, Officer Virgil and her partner detained Coleman, read him Miranda warnings, and procured statements from him. Coleman directed agents to a gun and money in his bedroom, and stated that the $49,000 in cash were the proceeds of cocaine sales. During the search a total of 1,370 grams of cocaine and various drug paraphernalia were found throughout his residence.

On March 14, 1997, Coleman was charged in a criminal complaint with knowingly and intentionally possessing with intent to distribute or dispense in excess of 500 grams of cocaine, in violation of 21 U.S.C. s 841(a)(1). On April 8, 1997, a federal grand jury returned a one count indictment charging that Coleman did knowingly and intentionally distribute a mixture containing cocaine, in violation of 21 U.S.C. s 841(a)(1) and 18 U.S.C. s 2. The indictment contained a forfeiture provision under 21 U.S.C. s 853 seeking the forfeiture of $49,162 in United States currency.

On May 28, 1997, the grand jury issued a six count superseding indictment, charging five additional counts. Counts Two, Three, and Four charged Coleman with knowingly and intentionally using a communication device in facilitating the commission of an act constituting a felony

(distribution of cocaine), in violation of 21 U.S.C. s 843(b); Count Five charged Coleman with knowingly and intentionally distributing a mixture containing cocaine, in violation of 21 U.S.C. s 842(a)(1) and 18 U.S.C. s 2; and Count Six charged Coleman with knowingly and intentionally possessing with intent to distribute a mixture containing cocaine, in violation of 21 U.S.C. s 841(a)(1) and 18 U.S.C. s 2.

Coleman filed various pretrial motions, including a Motion to Dismiss for Lack of Probable Cause to Support Warrantless Arrest, a Motion to Suppress Statements, and a Motion to Suppress Evidence and Statements. United States District Court Judge Rudolph T. Randa issued a decision on July 17, 1997, denying all of Coleman's motions.

Coleman entered a conditional plea of guilty to all six counts in the superseding indictment and agreed to the forfeiture provision. On December 12, 1997, he was sentenced by Judge Randa to 135 months in prison on Counts One, Five, and Six, and to 48 months in prison on Counts Two, Three and Four, with all sentences to be served concurrently. Judge Randa also ordered a five year period of supervised release on Counts One, Five, and Six, and a one year period of supervised release on Counts Two, Three, and Four, with all terms to run concurrently, for a total of five years of supervised release. The court also ordered a fine of $3,000, a special assessment of $600, and the forfeiture of $49,162. Coleman filed a timely notice of appeal.

ANALYSIS

Coleman advances several arguments to this court. He claims that the district court erred in denying his three pretrial motions, in allowing the government to use his proffer for purposes of determining relevant conduct at sentencing, and in attributing a weapons enhancement to him under United States Sentencing Guideline ("U.S.S.G.") s 2D1.1(b)(1). [FN1]

FN1. Appellant's counsel was smart to abandon his position at oral argument that the district court erred in not dismissing the indictment on the ground of lack of probable

cause for arrest. The indictment was properly preserved in this case. The law is clear that even "an illegal arrest without more can never be the basis for the dismissal of an indictment." New York v. Harris, 495 U.S. 14, 18, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990).

***677** Coleman first contends that the district court erred in denying his request for an evidentiary hearing on the search warrant for his house. In support of his motion to suppress evidence resulting from the search, he argues that an evidentiary hearing was necessary because the facts available to him at the time were limited. We believe the district court correctly denied Coleman's request for an evidentiary hearing.

[1][2] Evidentiary hearings on motions to suppress are not granted as a matter of course but are held only when the defendant alleges sufficient facts which if proven would justify relief. United States v. Woods, 995 F.2d 713, 715 (7th Cir.1993) ("A trial court is required to grant a suppression hearing only when a defendant presents facts justifying relief."); United States v. Hamm, 786 F.2d 804, 807 (7th Cir.1986). Evidentiary hearings are warranted only when the allegations and moving papers are sufficiently definite, specific and non-conjectural and detailed enough to enable the court to conclude that a substantial claim is presented and that there are disputed issues of material fact which will affect the outcome of the motion. United States v. Rollins, 862 F.2d 1282 (7th Cir.), cert. denied, 490 U.S. 1074, 109 S.Ct. 2084, 104 L.Ed.2d 648 (1989).

[3] Coleman has raised no facts which justify relief. Rather, he simply states that the testimony in support of the search warrant was insufficient, inaccurate, and stale. Coleman fails to indicate how an evidentiary hearing on a motion to suppress evidence from the resulting search would affect the outcome of his case. With nothing less conclusory to go on, we cannot say that an evidentiary hearing was necessary. United States v. Randle, 966 F.2d 1209, 1212 (7th Cir.1992) (reliance on vague, conclusory allegations is insufficient to warrant a suppression hearing).

Coleman also argues that the search warrant was invalid, and that the lower court therefore erred in refusing to suppress all the evidence seized pursuant to the search of his house, as well as the statements and other evidence resulting therefrom. He states that there was no evidence to link contraband to his house and that a warrant should not have issued.

[4] We review de novo the district court's determination that probable cause existed to issue the warrant. Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); United States v. Hunter, 86 F.3d 679, 681 (7th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 443, 136 L.Ed.2d 339 (1996). In doing so, however, we take care "both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas, 517 U.S. at 699, 116 S.Ct. 1657.

[5] We believe that the district court properly examined the information provided in the testimony in support of the warrant and correctly found that it set forth probable cause to believe that the items sought would be found in Coleman's home. Agent Virgil presented evidence from a confidential informant who witnessed Coleman selling cocaine in multiple ounce quantities to other individuals in January 1996. She also testified that in March of 1996, agents from her department received information from other informants that Coleman was again involved in trafficking multiple ounces of cocaine. In that same month, agents recorded conversations between Coleman and an informant. In August of 1996, another informant provided law enforcement officers with specific information about Coleman, his activities, and his current address. On March 4, 1997, Agent Virgil conducted a trash pick-up from Coleman's residence and recovered brown "tape-like" paper used to wrap kilogram quantities of cocaine, as well as corner cuts from plastic baggies and a white paper residue. A field test on these items revealed the presence of cocaine. Agent Virgil also recovered several magazines from the trash

bearing *678 Coleman's name and address. This evidence was more than ample to support the magistrate's finding that probable cause existed for issuing the search warrant of Coleman's residence. A fact-finder must focus on the totality of the facts presented; there was ample evidence to support the magistrate's issuance of the warrant in this case.

Coleman next contends that the statements he gave to Agent Virgil while she and other agents were searching his home should have been suppressed as being "fruits of the poisonous tree." He argues that he was illegally detained outside of his place of business and that therefore the statements he gave to the agents later in time, at his residence, were inadmissible. Because Coleman was lawfully detained at the time he made the statements in question, the lower court was correct in finding them admissible.

[6] Coleman next contends that the lower court erred in allowing the government to use his proffer for the purposes of determining his relevant conduct at sentencing. Because the proffer is silent on sentencing, Coleman claims that the government's use of it at sentencing violated the terms of the agreement. The district court did not err, however, in allowing the government to use Coleman's proffer for three reasons. First, because Coleman declined to work with the government, the plea agreement was never in effect and thus the proffer was not binding. See United States v. Cobblah, 118 F.3d 549, 551 (7th Cir.), cert. denied, 118 S.Ct. 638, 139 L.Ed.2d 616 (1997) (proffer agreements are contracts that must be enforced according to its terms to be enforceable). Second, even if the proffer were in effect, Coleman violated its terms. According to the agreement, "... in the event that any information is presented either to the court or a jury in this case by, or on behalf of your client, and such information contradicts statements made by your client during the anticipated interview, then the government will be free to use any such statements against your client." Coleman presented contradictory testimony regarding the amount of cocaine attributed to him. As such, he violated the terms of the agreement, thereby making it unenforceable. See Cobblah,

118 F.3d at 551.

Third, evidence independent of the proffer existed regarding Coleman's relevant conduct. See United States v. Sadiq, 116 F.3d 213, 214 (7th Cir.1997).

[7][8] Finally, Coleman contends that the district court erred in attributing a weapons enhancement to him under U.S.S.G. s 2D1.1(b)(1). Specifically, he asserts that mere possession of a weapon is not enough. We will reverse the district court's enhancement for possession of a weapon only if we find clear error. United States v. Adams, 125 F.3d 586, 596 (7th Cir.1997). The Sentencing Guidelines make clear that a two-level upward departure is warranted "[i]f a dangerous weapon (including a firearm) was present." U.S.S.G. s 2D1.1(b)(1). Application Note 3 indicates that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. s 2D1.1(b)(1) (n. 3). The government is required to show only that the weapon was possessed during any relevant conduct, not that the weapon was present during a specific drug trafficking offense. Adams, 125 F.3d at 596. Here, the district court correctly inferred that it was not clearly improbable that the fully loaded .38 caliber Taurus revolver found in his home--the same place where defendant was conducting his business--was connected to the drug offense. See United States v. Pippen, 115 F.3d 422, 425 (7th Cir.1997) (allowing district court to infer that gun was connected to the drug crime when it was possessed at the very place where defendant was conducting his business). Therefore the district court correctly enhanced Coleman's sentence.

CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 17, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 97-4206

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIE P. COLEMAN,
Defendant-Appellant

ORDER

The petition for rehearing filed in the above-captioned case by defendant-appellant is DENIED.

APPENDIX C

THE COURT: Well, it's the position of the Government that the objections to the presentence report--and now I take it we're dealing with the amount of cocaine that the Defendant is claiming responsibility for, is that correct? We're dealing with those objections in the presentence report? That is, to that aspect of it?

MS. KRAFT: Yes, Your Honor.

THE COURT: And I haven't seen, obviously, the information that was gleaned or taken during this interview and that were part of this proffer, but what I understand the posture of this issue to be, at this juncture, is that at the time of the interview the Defendant made a statement that now is in opposition to what his position is at this sentencing. Is that the Government's position?

MS. KRAFT: Yes, Your Honor.

THE COURT: Well, the case that has just been handed to me, U.S. vs. Richardson, et. al., including one Nate Hall, one of the Defendants whose argument is being heard in this case by the Seventh Circuit. And Judge Evans having written the decision, dealt with the fact situation whereby the proffer was used in the Government's rebuttal case. Judge Evans makes clear that he understands and knows from long experience what a proffer is and how it's used. And he explains that's a Defendant--or someone who is hoping not to become a Defendant--controlled statement made to

Government Agents made to facilitate Plea Agreements or discussions. Which is defense argument here. That's it's made to do that. To bring things to an early resolution.

In this case, Hall entered into a proffer agreement under which the Government agreed not to use the information he provided during its case in chief. At this juncture, we're talking in a context of a trial. Judge Evans goes on to say if Hall testified contrary to the agreement, however, or presented a position contrary to the substance of the agreement, all deals were off and the Government would be allowed to use his statements against him.

If we look at that sentence alone, standing alone, would seem to apply to this case. Talking about testifying contrary to the agreement or taking a position contrary to the substance--to the substance of the agreement. All deals are off. And the Government would be allowed to use the statements against him. Judge Evans states, this sort of a provision is standard fare in pretrial dealings over statements to be offered by Defendants.

It's clear from this and the following--Judge Evans indicates in Hall's proffer, he said he participated in the conspiracy and began selling drugs after being approached by another member of the conspiracy. Said Richardson was the source of the heroin he sold. These statements were interpreted by the Government to show that Hall was a willing participant in the conspiracy. And then at trial Hall

seemed to be setting up a defense of coercion.

In allowing its use, Judge Holderman, Judge Evans says, quote, didn't even come close to abusing his discretion when he permitted the Government to use part of Hall's proffer against him as part of its rebuttal case. And it mattered not at all that Hall didn't personally testify contrary to the proffer, because he, in effect, did the same thing by presenting Officer Rodriguez to the jury. Who, according to these facts, then presented his position which was contrary to the position he took in the proffer.

It seems like the Court is very, I will say, flexible, but also open to utilizing these statements when, as argued by defense counsel, not only should the Government not go back on its word, but also the Defendant should not go back on its word. And it appears that these proffers are viewed as agreements.

But before I make a decision on this, I'd like to take a look at U.S. vs. Dortch. What was that? 5 F.3d?

MS. KRAFT: 5 F.3d at Page 1056, Your Honor.

THE COURT: I am going to take a look at that case, too, before I make a decision on this matter because it may explain it more.

(Whereupon a recess was called by the Court. Upon conclusion of the recess, the proceedings continued as follows:)

THE COURT: The Court has had an opportunity to

read the Dortch case and compare it also with, of course, the Richardson, Tate, Palmer, Hall case, one that Judge Evans wrote, that the Court referred to earlier. And the thrust and tenor of both of these decisions is, as I think the Court alluded to earlier, and that is that Courts are putting a high priority on the truth and the extraction of the truth, both from the Government and the defense.

The Court in Dortch discussed the catch-22 position as argued by the defense in the Dortch case, and stated that in response to the argument that plea negotiations are jeopardized by such a position, it's stated we do not believe plea negotiations are jeopardized. The Defendant is aware before his initial conversation with the Government that if he later makes inconsistent statements at trial or elicits evidence inconsistent with his proffer statement from other witnesses at trial, those statements of his can be used against him. In commenting on the catch-22 position, that they must sign the proffer letter waiving their rights in order to enter into a plea negotiation with the Government. The Court deemed that argument to be without merit. And they discuss further constitutional rights that can be waived by Defendants in various ways.

Second, the Defendant is only harmed by waiving his rights if he elicits or produces inconsistent testimony at a later date. Therefore, holding the Defendant to the terms of the proffer letter fosters another laudable policy, encouraging

Defendants to tell the truth during both plea negotiations and subsequent trials.

Now, we're not dealing with the plea negotiation stage, nor are we dealing with a trial. And one of the Court's concerns was--and I think it's defense position--that this isn't either of those. This is a non-trial context. And does it apply to the sentencing process? I think that last objective, that laudable policy that the Seventh Circuit indicated is encouraged, can apply not only to the plea negotiations, subsequent trials, but in the presentation of any evidence or position. Because the Courts take a look at positions of the Defendant as to whether or not testimony is going to be used. So in the presentation of any information or position to the Court, including sentencing.

In regards to the facts of the Dortch case, the Defendant's proffer was used against a fellow Defendant who testified that he, the appealing Defendant, was not involved in a way and fashion and form that he, the Defendant, indicated that he was during his proffer. The Government there was allowed to use not only the witness's proffer against him, but also the appealing Defendant's proffer against the witness who attempted to exculpate the appealing Defendant. So it is fairly clear that the Courts in order to get at--or in order to preserve what they believe to be the need for truthfulness and honesty and forthrightness at the plea negotiation stage--and further would, in the Court's opinion,

allow the application and use of the proffer if indeed and in fact the proffer--which is deemed an agreement between the parties in the contract--to be utilized if, in fact, the proffer allows for such. And that, I think, forces the Court to look at the proffer that was rendered in this case.

The important language here is that further, it states, however, any and all of his statements made be used against him in any prosecution for perjury or making a false statement. Now, that essentially tracks Rule 11(e)(6), which indicates that--after stating that, in general, proffers, plea negotiations, and discussions and related statements are excluded from use--and 11(e)(6) talks about the fact that in any civil or criminal proceeding it is improper to use a plea of guilty which is later withdrawn, a plea of nolo contendere, any statement made in the course of any proceeding under this rule regarding either of the foregoing pleas of any statement made in the course of plea negotiations with an attorney for the Government which did not result in a plea of guilty, or which resulted in a plea of guilty later withdrawn. The exception is that if it's used in some proceeding or context in which the full and complete statement should be considered, then in fairness--and in fairness ought to be used. It can be used. And in a criminal proceeding for perjury or false statement.

Now, that tracks what I have just read from the proffer that was rendered on March 11th, 1997. But this

proffer goes on to state--and here is the critical language: Quote, further, in the event that any information is presented either to the Court or a jury in this case by or on behalf of your client, and such information contradicts statements made by your client during the anticipated interview, then the Government will be free to use any such statements against your client.

The first sentence clearly tracks the Statute 11(e), as the Court has indicated, and that language talks about using the proffer under those circumstances in a prosecution for perjury or making a false statement.

The subsequent sentence, as the Court has just read, I think is expansive and anticipates and suggests the use of it in any information presented to a Court. And information presented to a Court and position taken before a Court on a sentencing I think has to be included in that. For what it's worth, this is a sentencing, and the rules of evidence are relaxed. The information is not being--information from the proffer is not being utilized to determine the guilt or innocence of the Defendant, although it should be noted that a larger or lesser sentence is certainly of great importance.

But the rules of evidence are relaxed. I think that may have impact on any future Court's consideration of this issue as to whether or not a proffer--when information in the proffer differs from that offered in information provided and presented to this Court at a sentencing--can be used. And this

case is going to be appealed, and it will have to be included in the appeal which is being made relative to the search and seizure aspect of the case.

But the Court will allow the proffer to be used if it's inconsistent, and the Court will make that determination if it's inconsistent with the position taken in the presentence report, or at this sentencing. So does the Government wish to present that at this time?

U.S. Department of Justice

United States Attorney

Eastern District of Wisconsin

517 East Wisconsin Avenue *414/297-1700*

Milwaukee, Wisconsin 53202

March 11, 1997

Mr. Jonathan Smith
Attorney at Law
1124 West Wells Street
Milwaukee, Wisconsin 53233

Re: Willie P. Coleman

Dear Mr. Smith:

It is my understanding that your client, Willie P. Coleman, is interested in providing information, testimony and/or other assistance regarding his knowledge of narcotics trafficking activities. To that end, it is requested that Mr. Coleman be interviewed by federal agents to assess the value of any information or assistance Mr. Coleman may proffer.

During the interview and testimony, your client must be completely truthful. Anything relayed to the government by you or your client during the proceedings will not be used directly against Mr. Coleman in any criminal proceedings, consistent with Rule 11(e) of the Federal Rules of Criminal Procedure. However, any and all of his statements may be

used against him in any prosecution for perjury or making a false statement. Further, in the event that any information is presented either to the court or a jury in this case by, or on behalf of your client, and such information contradicts statements made by your client during the anticipated interview, then the government will be free to use any such statements against your client. All statements made prior to this agreement by Mr. Coleman are not covered by this agreement. Further, the government remains free to make derivative use of information provided by Mr. Coleman during any debriefing or court proceeding.

This letter embodies the entire agreement regarding your client's anticipated interview and potential testimony. No other promise or agreement exists between your client and this office regarding the proceedings. If the terms of this letter are agreeable to you and your client, please so indicate by signing it prior to beginning the interview and proceedings.

Sincerely,

THOMAS P. SCHNEIDER
United States Attorney

By: /s/Carol L. Kraft

CAROL L. KRAFT
Assistant United States Attorney

Agreed and consented to:

/s/Willie P. Coleman Date 3/12/97
Willie P. Coleman

/s/Jonathan Smith Date 3/12/97
Attorney for Willie P. Coleman